

FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 559

REPUBLIC AVIATION CORPORATION, a Corporation,

and

LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,
Petitioners,

v.

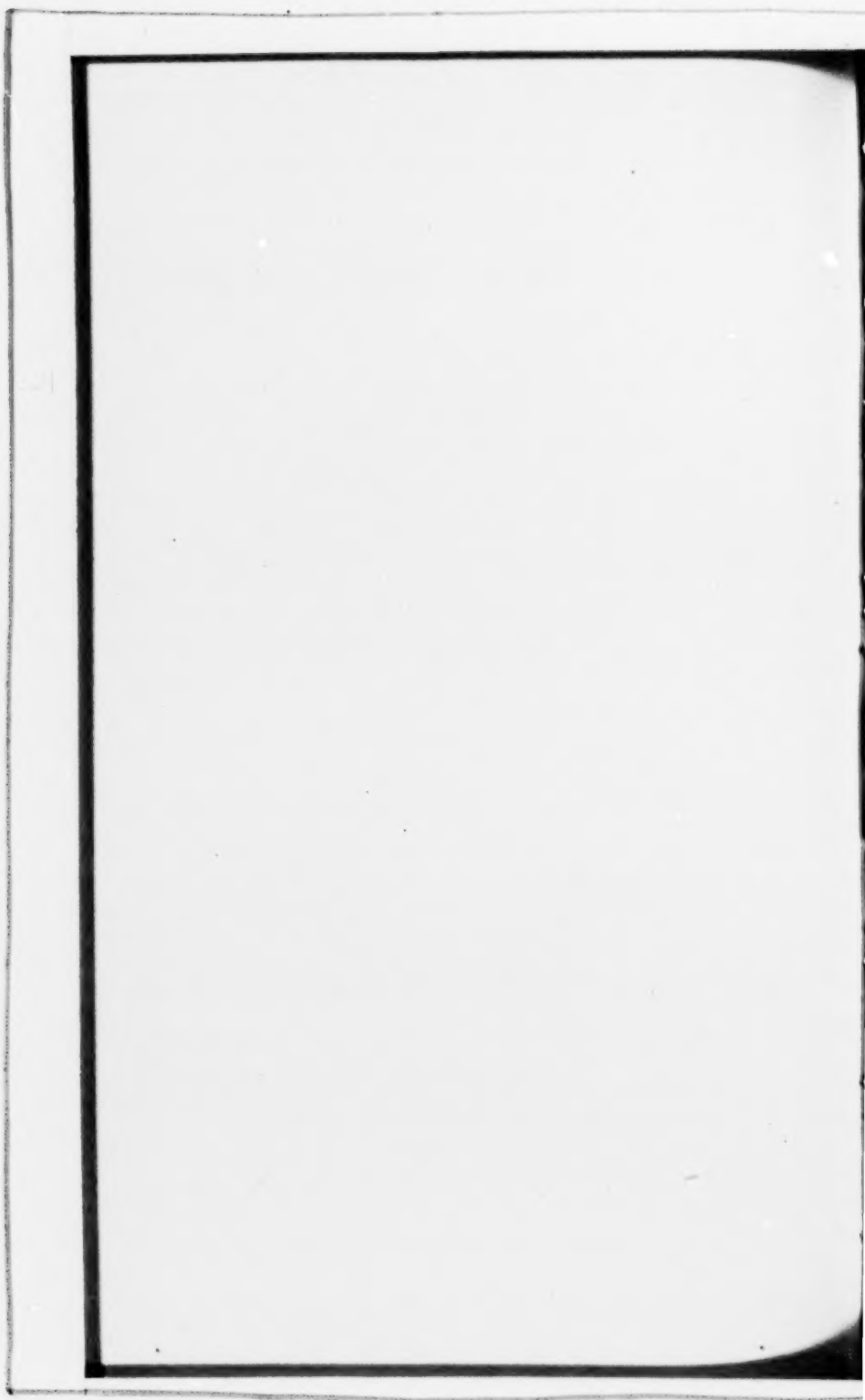
SAMUEL S. LOWE, Deputy Commissioner of the United States Employees'
Compensation Commission, Second Compensation District,

and

AIDA M. PARKER,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND BRIEF IN
SUPPORT THEREOF**

JOHN P. SMITH,
ALBERT P. THILL,
Counsel for Petitioners.



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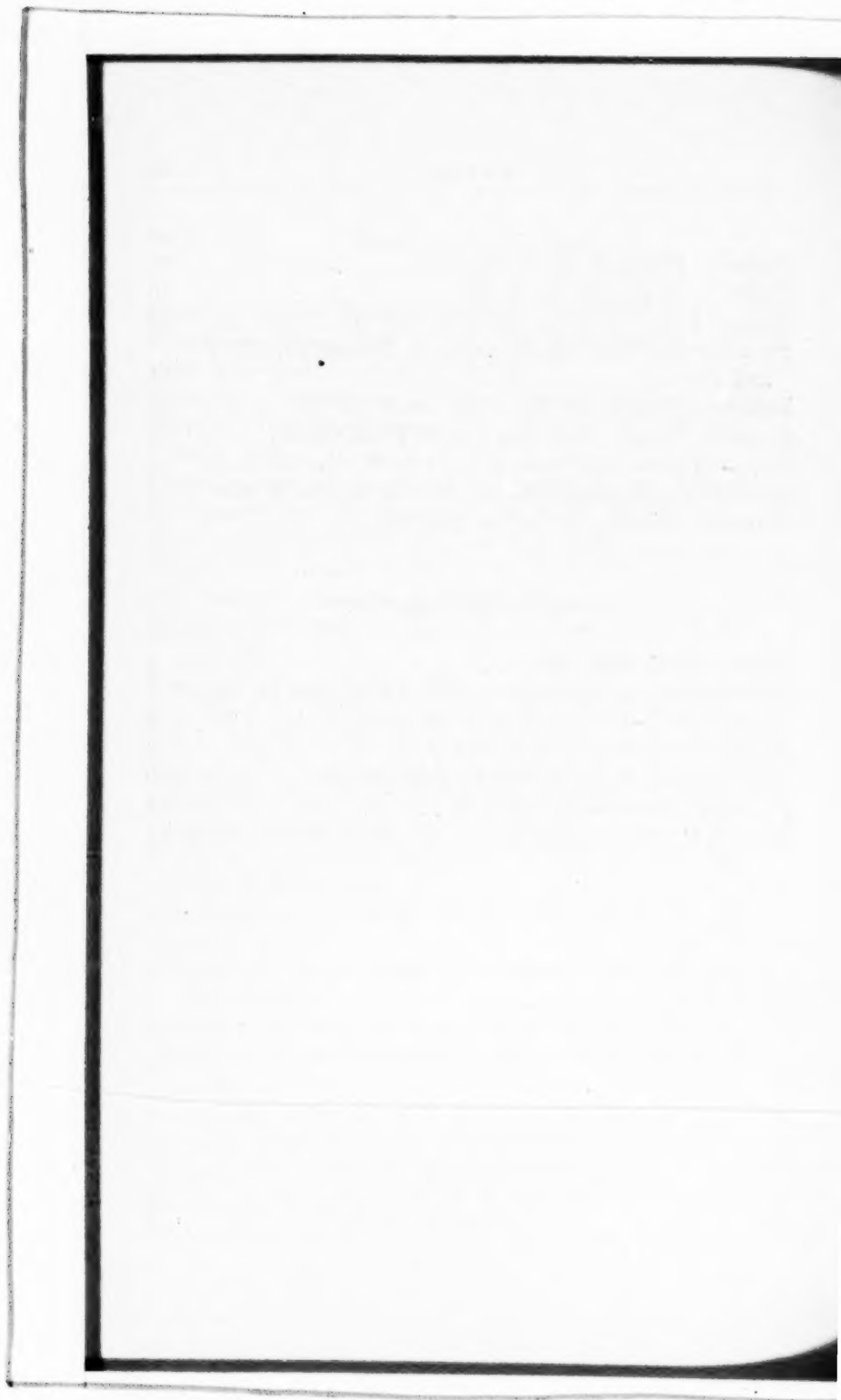
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No.

REPUBLIC AVIATION CORPORATION,
a Corporation,

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LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation,

Petitioners,

v.

SAMUEL S. LOWE, Deputy Commissioner of the United
States Employees' Compensation Commission, Second
Compensation District,

and

AIDA M. PARKER,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

*To the Honorable The Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:*

Republic Aviation Corporation, a Corporation, and
Liberty Mutual Insurance Company, a Corporation, re-
spectfully petition this Honorable Court to issue a writ of
certiorari to review the judgment of the United States
Circuit Court of Appeals for the Second Circuit in the above

entitled case entered November 6, 1947 (R. 118)* affirming an order and judgment of the United States District Court for the Southern District of New York.

A

Summary Statement of Statutes Involved, Prior Proceedings and Facts of the Case

Statute

This case involves the construction and interpretation of the "Defense Bases Act," 42 U. S. C. 1651-a, 1 and 4.

A brief history of this legislation is worthy of note.

Shortly prior to the enactment of the first Defense Bases Act (August 16, 1941) the United States had acquired lend-lease bases upon which it intended to construct permanent air, naval and military installations. This construction contemplated the erection of new buildings, fortifications, housing, roads, etc. To accomplish that purpose, it was necessary to enlist laborers and workmen from all parts of the United States to do the carpentry, masonry, plumbing, electrical and kindred construction work. One of the most cogent factors motivating the enactment of the Defense Bases Act was the necessity of providing a uniform system of workmen's compensation for the above described workmen from the continental United States. Many of the native states of these workmen had compensation statutes that were inadequate to deal with accidents occurring outside the state. It was the Government's experience that difficulty was encountered in securing workmen unless some provision was made for compensation benefits to them in the event of injury.

There is nothing, in either the Congressional Record or committee reports, to indicate a legislative intent to force

* Reference throughout is to page numbers of record on appeal in C. C. A. below.

within the coverage of the Defense Bases Act, such highly specialized professional technicians as Joseph Parker and the Republic Service Contract under which he operated. The purpose and intent was rather directed to workmen working for contractors engaged in the construction of military installations on the lend-lease bases. The original act, Public Law #208, 55 Stat. 622 in so far pertinent read

“That except as herein modified, the provisions of the Act entitled ‘Longshoremen’s and Harbor Workers’ Compensation Act,’ approved March 4, 1927 (44 Stat. 1424), as amended, and as the same may be amended hereafter, shall apply in respect to the injury or death of any employee engaged in any employment (at any military, air or naval base acquired after January 1, 1940, by the United States from any foreign government) or any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, irrespective of the place where the injury or death occurs.”

After the entry of the United States into World War II it was necessary to give the Defense Bases Act, a worldwide geographical application and it was for that reason the Defense Bases Act was amended in December, 1942. The need for compensation coverage at the original lend-lease bases had not ceased, however, because construction work was still proceeding at those bases. In the 1942 amendment, therefore, Congress retained the coverage for the lend-lease bases by incorporating the precise words from the 1941 legislation into the 1942 amendment and numbered it subdivision 1. Thus the geographical coverage afforded for the lend-lease bases by the 1941 legislation was retained in the 1942 statute. The wider geographical scope that prompted the passage of the 1942 amendment was affected not by changing the words or intention of subdivision 1 but rather by adding subdivisions 2, 3 and 4

which are not found in the original 1941 statute. Title III of Public Law 784, December 2, 1942, 56 Stat. 1035 42 U. S. C. 1651 read in so far as material as follows:

“That (a) except as herein modified, the provisions of the Longshoremen’s and Harbor Workers’ Compensation Act,—shall apply in respect to the injury or death of any employee engaged in any employment—

- (1) At any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government
- (2) (not material)
- (3) (not material)
- (4) under a contract entered into with the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1), (2), and (3) of this subdivision, for the purpose of engaging in public work, * * * irrespective of the place where the injury or death occurs. * * *

Prior Proceedings

Respondent Deputy Commissioner, Samuel S. Lowe, awarded death benefits to Aida M. Parker as widow (R. 8-10) deciding that her claim fell within the Defense Bases Act 42 U. S. C. 1651-(a) (4) (R. 9, 21).

Pursuant to 33 U. S. C. 921 petitioners instituted a suit in the United States District Court, Southern District of New York to set aside the aforesaid award (R. 3-7).

On respondents’ motion for summary judgment (R. 12-13) (under Federal Civil Rule 56-b) the said District Court dismissed petitioners’ complaint and rendered final judg-

ment for respondents; deciding that the Deputy Commissioner was correct in finding the said claim fell within 42 U. S. C. 1651-(a) (4) (R. 103).

On petitioners' appeal to the United States Circuit Court of Appeals, Second Circuit, the District Court judgment was affirmed (R. 118). The Circuit Court, however, decided the claim fell within Section 1651-(a) (1) and specifically did not consider the question of whether the claim fell within Section 1651-(a) (4) as had been decided by the Deputy Commissioner and the District Court.

Facts

In order to properly service and secure the best performance from aircraft supplied to the United States Government by the Republic Aviation Corporation (referred to throughout as Republic), the War Department and Republic entered into a service contract under the terms of which Republic agreed to furnish the services of its aircraft technicians to the Army Air Forces wherever requested.

This contract was dated October 29, 1943 marked in evidence as Carrier's Exhibit 1 (R. 26). The exhibits are reprinted at R. 37-85.

After the Allied Armed Forces invaded the Pacific Island of Ia Shima, a technical problem arose as to how to fly the then new Republic P-47, long range fighter plane to obtain its maximum efficiency (R. 29). To solve this problem, the United States Army called upon Republic to perform under its aforesaid service contract and accordingly, Joseph F. B. Parker, employed by Republic as a test pilot and technician, was on August 4, 1945 sent by Republic from its plant at Farmingdale, New York, to Ia Shima (R. 25). His salary and expenses of transportation were charged to the service contract, Carrier's Exhibit 1 (R. 28).

On August 20, 1945, while engaged in attempting to solve the technical problem which brought him there, Parker was killed in a test flight take off from Ia Shima in a Republic P-47 (R. 28).

B

Jurisdiction

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered November 6, 1947 (R. 119). The jurisdiction of this Court is invoked under its Rule 38 (5b) and Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C. 347 (a)).

C

Questions Presented

1. What is the scope and meaning of the term "public work" as defined in the Statute (42 U. S. C. 1651-b) and was the service contract between the United States Government and Republic dated October 29, 1943 a contract for public work within the statutory definition?

2. What is the scope and meaning of the term "acquired" as used in the Statute (42 U. S. C. 1651-a-1) and was Ia Shima acquired by the United States within the meaning of the statute?

3. Since the only question litigated at the trial was whether the contract between the Government and Republic was a "public work" contract, within Subdivision a-4, and no evidence introduced on the issue of whether Ia Shima was "acquired" within the meaning of Subdivision a-1, was it error for the Circuit Court to sustain the award on the theory that Ia Shima was acquired within Subdivision a-1?

D

Reasons Relied on for the Allowance of the Writ

1. The Circuit Court of Appeals below has decided herein an important question of federal law which has not been, but should be, settled by this Court. (United States Supreme Court General Rule 38, (5) (b) *Del Vecchio v. Bowers*, 296 U. S. 280, 285.)

2. The case at bar is of great general importance and relates to the construction and effect to be given the Defense Bases Act, 42 U. S. C. 1651 *et seq.*, the interpretation of which has never been passed upon by this Court.

Canadian Aviator, Ltd. v. United States, 324 U. S. 215, 216.

3. The construction to be given the Defense Bases Act is of paramount importance to all employees working outside the continental limits of the United States for employers under contracts with the United States Government. Since the contracts between the employers and the United States Government are "cost-plus fixed fee contracts," the United States Government and in turn each and every taxpayer in the country is affected by the construction to be given the Defense Bases Act. The question presented is sufficiently important therefore to call for an exercise of this Court's power of supervision over this case.

4. The judgment of the Circuit Court of Appeals herein appealed from results in a substantial denial of justice to the employer and carrier, petitioners. At the beginning of the trial, the Deputy Commissioner, on behalf of himself and the claimant Aida Parker, expressed a belief (R. 21) that "the instant case is within the scope of the Act and particularly within the scope of subdivision 4 which relates to public work." The Deputy Commissioner further read into the record (R. 21, 22, 23) the adminis-

trative interpretation given the term "public work" by the War and the Navy Department of the Government.

As a consequence the only evidence offered at the trial dealt solely with the question of whether petitioner Republic's contract with the Government was a public work contract. The question of whether Ia Shima was acquired was never litigated.

By sustaining the award on the ground that Ia Shima was acquired within the meaning of subdivision a-1, the Circuit Court of Appeals below has decided this case on a ground that was never litigated and upon which no evidence whatever was introduced.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all proceedings in the case numbered and entitled on its docket, #20645, Republic Aviation Corporation and Liberty Mutual Insurance Company, plaintiffs-appellants v. Samuel S. Lowe, Deputy Commissioner of the United States Employees' Compensation Commission, Second Compensation District and Aida M. Parker, defendants-appellees, and that the judgment therein of said United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

REPUBLIC AVIATION CORPORATION AND LIBERTY
MUTUAL INSURANCE COMPANY

By: JOHN P. SMITH
ALBERT P. THILL,
Counsel for Petitioners.

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**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI**

I

Opinions Below

The opinion of the United States District Court for the Southern District of New York was rendered December 10, 1946 (R. 86-105) and is reported in 69 F. Supp. 472.

The opinion of the United States Circuit Court of Appeals for the Second Circuit was rendered November 6, 1947 (R. 113-118) and is reported in 164 F. 2nd 18.

II

Statement of the Case

A statement of the facts and questions involved herein will be found in the petition for writ of certiorari (*supra*).

III

Specification of Errors

The United States Circuit Court of Appeals for the Second Circuit erred:

1. In affirming the judgment in favor of respondents rendered by the United States District Court for the Southern District of New York;
2. In holding that Ia Shima was "acquired" by the United States.
3. In sustaining the award of the Deputy Commissioner on a ground which was not litigated and on which the record contains no evidence.

IV

Summary of the Argument

POINT 1. The questions involved, concerning the interpretation of a Federal Statute are of substantial general importance and should be passed upon and settled by this court.

POINT 2. The Circuit Court of Appeals below erroneously held Ia Shima was "acquired" by the United States and in any event decided the case on a theory not litigated and on which the record contains no evidence.

POINT 3. The contract between Republic and the Government was not a contract for public work; this claim is therefore not within 42 U. S. C. 1651-a4.

POINT I

Research shows this Court has never passed upon or interpreted any part of the Defense Bases Act (42 U. S. C. 1651, *et seq.*).

It is of utmost importance to employees and their dependents, employers and the Government that this Court authoritatively speak on the question.

The employees affected, in many cases, come from States having workmen's compensation statutes with extra territorial jurisdiction. Until this Court speaks, employees and their dependents will be forced to guess whether their claims are to be made under the State Workmen's Compensation Statutes or under the Federal Defense Bases Act.

Employers are in precisely the same predicament. Until this Court decides just where the local State Statutes end and the Federal Statute begins, employers are never justified in voluntarily accepting and paying compensation benefits. Regardless of whether the claim is brought in the State tribunal or under the Federal Statute, it must be resisted since it would be voluntarily accepted at the peril of the employer and his carrier.

In fact, petitioner Liberty Mutual is faced with two other claims presently pending in the Supreme Court of New York, Appellate Division, Third Department.

The contract between Republic and the Government was a "cost-plus fixed fee" contract. If Republic and its carrier Liberty Mutual Insurance Company voluntarily accepted a claim under either State or Federal jurisdiction which later court decisions determine to be the wrong tribunal, the Government would not and could not reimburse Republic and its carrier for the erroneous acceptance and payment of the claim.

The Government is wholly unable to calculate and keep current the cost of its far flung defense bases construction projects.

If, however, this Court exercises its power to review this decision and authoritatively speaks on the subject, the reciprocal rights and obligations of all the above enumerated people will be understood and accepted thus avoiding endless and costly litigation.

A decision on this question will constitute "a precedent of general application." *DelVecchio v. Bowers*, 296 U. S. 280, 285.

POINT II

The Circuit Court of Appeals below decided that Ia Shima had been "acquired" by the United States and that this claim, therefore, fell within 42 U. S. C. 1651 (a) (1).

It is respectfully submitted such was error.

The word "acquired" is defined in Funk and Wagnall's New Standard Dictionary as

"to obtain by search, endeavor, practise or purchase; get as one's own."

The Century Dictionary and Cyclopedia defines the word acquire as follows:

"to get or gain, the object being something which is more or less permanent, or which becomes vested

or inherent in the subject; a mere temporary possession is not expressed by acquire but by obtain, procure, etc."

Words used in a statute are to be given their ordinary, obvious and rational meaning. *Bozar v. Central Pa. Quarry*, 73 F. Supp. 803.

The ordinary every day meaning as well as the dictionary meaning of the word acquired carries with it a note of some degree of lasting permanence. There is no necessity of delving into the international law, technical definition of the word acquire to reach its common accepted and understood meaning. See C. C. A. opinion (R. 116-117).

A thing is not acquired when the clear unambiguous intent is to merely use it temporarily, to serve a temporary need, and when the immediate need is terminated to dispose of the thing.

Helvering v. San Joaquin Co., 279 U. S. 496;
Commissioner of Insurance v. Broad Street Mutual Casualty Co., 312 Mass. 261; 44 N. E. 2d. 683;

Clarno v. Gamble-Robinson Co., 251 N. W. 268, 190 Minn. 256;

Parker v. Schrimsher, 172 S. W. 165 (Tex. Civ. App.);

In re: Okahara, 191 Cal. 353, 216 P. 614;

1 Corpus Juris Secundum 918.

To say that the United States "acquired" Ia Shima logically requires a holding that the United States also acquired parts of North Africa, Italy, France, Germany, Holland, Belgium, China and many other parts of the world.

The fact is, however, all the United States did was to use those various far flung lands as temporary bases from which to project the war effort further and to its final con-

clusion. When security dictated the United States withdrew its troops and equipment as soon as it was practical from these foreign lands and eventually intends to dispose of all of them on some basis, the exact details of which are not now clearly known in all cases.

Concededly the language of Section 1651 (a) (1) as contained in the original act of August 16, 1941 applied only to the British Lend Lease Bases. Although there may have been no formal transfer of sovereignty of those British bases, there nevertheless is a substantial note of permanence to the transfer from Britain to the United States. It is the intention of the United States Government to permanently use those bases, so close to our Atlantic coast, on a continuous long term basis. Regardless of the fact that there had been no transfer of sovereignty sufficient to satisfy the international law requirement of acquired territory (*Fleming v. Page* 9, How. 603), there was nevertheless a definite difference between the circumstances surrounding the British bases and such far flung territory as Ia Shima, North Africa, Italy, etc.

In any event the Record on Appeal is absolutely silent on the issue of what troops took over Ia Shima, the intent of the Government in so doing, how long the troops remained and what happened to Ia Shima after the troops left. The answers to all these questions are necessary to determine whether in fact Ia Shima was actually "acquired," and the Circuit Court's opinion is, therefore, predicated on pure speculation rather than on actual evidence. For the Circuit Court of Appeals to thus base this case on a theory different from that on which it was tried and concerning which there is no evidence in the record, was error.

Helvering v. Gawran, 302 U. S. 238;

Peck v. Heurich, 167 U. S. 624;

Publicity Building Realty Corp. v. Hannegan, 139 F. 2nd 583;

Spann v. Commer Std. Ins. Co., 82 F. 2nd 593.

POINT III

The contract between Republic and the Government was not a contract for Public Work; therefore this claim is not within 42 U. S. C. 1654 (a) (4).

The respondent Deputy Commissioner as well as the United States District Court below held that the claim herein fell within 42 U. S. C. 1651 (a) (4). Such was error.

The Circuit Court of Appeals below did not follow that holding (sustaining the award on 42 U. S. C. 1651 (a) (1)), and although the reasons why such a holding constituted error were briefed at length in the Circuit Court of Appeals below, the same will be presented in summary here.

It is axiomatic that where legislation defines a term used in a statute, Courts are bound by that definition.

For v. Standard Oil Co., 294 U. S., 87, 95.

The Legislature included in the Defense Bases Act a definition of public work as follows (42 U. S. C. 1651 b).

"Any fixed improvement or any project, involving construction, alteration, removal or repair for public use of the United States or its Allies, including but not limited to projects in connection with the war effort, dredging, harbor improvements, dams, roadways and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project." (Italics ours.)

The respondents contended in the Courts below that Congress intended to include within that definition all types of work in connection with the war effort.

It is submitted, however, if such was the purpose and intent of the legislators, they could have very simply said so. Instead, they included the above, lengthy, precise, par-

ticularized definition of the type of public work the legislation was intended to cover. By specifying that the work covered must involve a fixed improvement or construction, alteration, removal or repair in connection with the war effort, they designated the type of work in connection with the war effort to be included. Therefore, any work not within the specific or similar classifications enumerated in the statutory definition was excluded therefrom. The services of a test pilot was not one of the species of work set forth in the statutory definition.

This legal principle of *ejusdem generis* in statutory construction is illustrated by the following cases.

Hodgson v. Mountain and Gulf Oil Co., 297 Fed. 269, affd. 20 F. 2d 1022;

In re Bush Terminal, 93 F. 2d 659;

Lyman v. Commissioner of Internal Revenue, 83 F. 2d 811;

People v. Ryan, 274 N. Y. 149.

Wholly apart from the *ejusdem generis* rule of construction above, which excludes Parker and Republic's contract from 42 U. S. C. 1651 (1) (4), there is a further and equally cogent reason for so doing, *i.e.*, the distinction between "work" and "services."

Nowhere in the Defense Bases Act or its legislative history is there any indication of an intention to include "services" within the definition of the word "work." Throughout the statute under consideration, the words "project" and "work" are universally used; the word "services" is conspicuous by its absence. It must be assumed that when Congress used the word "work" in the statute, it was using that word in its generally understood meaning.

Webster's Dictionary of the English language (World Publishing Company, 1940), page 1983, defines the transi-

tive verb "work" as "to bestow labor, toil or exertion upon." However, when we examined the Republic contract in question which the Government contended was within the scope of the Defense Bases Act, we find that instead of referring to "work," "workmen" and "project" as does the statute, the contract rather uses the words "services" and "technicians" and is referred to throughout as a "service contract."

The record further reveals that the operation called for by the contract, and in which Parker was engaged, required the highest degree of skill and engineering ability and probably could not have been performed by more than a relatively few men in the entire world at that time. The Republic P-47 was then a new model airplane (R. 29) which at that time could be handled by but a very few men in Republic's employ and out of that few, General Kenny specifically requested that Parker be sent to the Far East to solve the problem of adapting the P-47 to conditions at Ia Shima (R. 25-29). Joseph Parker was literally the one man in the world upon whom the United States Government could rely to accomplish that feat. To say that Joseph Parker was engaged in "work" and that the contract under which he operated was a "work" contract is to use that word in a much broader sense than is recognized by dictionary definition, statutory definition, common usage and legal authority.

This distinction between "public work" and "expert services" has been recognized by every jurisdiction that has had occasion to pass upon the question and no exceptions have been brought to light by the research of counsel.

Employers Casualty v. Steward Abstract Co., 17 S. W. (2d) 781;

Swanton v. Corby, 38 Cal. A. (2d) 227;

People v. Flagg, 17 N. Y. 584;

Heston v. Atlantic City, 93 N. J. L. 317;

Braatan v. Olson, 28 N. D. 235, 148 N. W. 829;

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IV

CONCLUSION

This case warrants the exercise by this Court of its supervisory powers in that the questions here involved may be permanently settled by this Court and a proper construction and interpretation made of the Defense Bases Act, and that to such an end a writ of certiorari should be granted and this Court should reject the decision of the United States Circuit Court of Appeals for the Second Circuit and finally reverse it.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 559

REPUBLIC AVIATION CORPORATION AND LIBERTY
MUTUAL INSURANCE COMPANY, PETITIONERS

v.

SAMUEL S. LOWE, DEPUTY COMMISSIONER OF THE
UNITED STATES EMPLOYEES' COMPENSATION
COMMISSION, SECOND COMPENSATION DISTRICT,
AND AIDA M. PARKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

BRIEF FOR RESPONDENT DEPUTY COMMISSIONER IN
OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of New York (R. 86-103) is reported at 69 F. Supp. 472. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 113-118) is reported at 164 F. 2d 18.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Second Circuit was entered November 6,

1947 (R. 118-119). The petition for a writ of certiorari was filed January 30, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the air base being used by the armed forces of the United States on Ia Shima is an air base "acquired after January 1, 1940, by the United States from any foreign government" within the meaning of Section 1 (a) (1) of the Defense Base Act, as amended.

2. Whether the court below erred in sustaining the award under the Defense Base Act on the theory that Ia Shima was "acquired" within the meaning of Section 1 (a) (1) of that Act as amended, where the award was made by the deputy commissioner and was sustained by the District Court on the theory that claimant's decedent was employed under a contract for "public work" within the meaning of Section 1 (a) (4) of that Act as amended.

3. Whether a service contract under which the Republic Aviation Corporation agreed to furnish to the United States the services of aircraft technicians is a contract for "public work" within the meaning of Sections 1 (a) (4) and 1 (b) of the Defense Base Act, as amended.

STATUTE INVOLVED

The pertinent portions of Section 1 of the Defense Base Act of August 16, 1941, c. 357, 55 Stat.

622, as amended by Title III of the Act of December 2, 1942, c. 668, 56 Stat. 1035 (42 U. S. C., Supp. V, 1651), are as follows:

That (a) except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee engaged in any employment—

(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

* * * * *

(4) under a contract entered into with the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1), (2), and (3) of this subdivision, for the purpose of engaging in public work, and every such contract shall contain provisions requiring that the contractor (and subcontractor or subordinate contractor with respect to such contract) (1) shall, before commencing performance of such contract, provide for securing to or on behalf of employees engaged in such public work under such contract the payment of

compensation and other benefits under the provisions of this Act, and (2) shall maintain in full force and effect during the term of such contract, subcontract, or subordinate contract, or while employees are engaged in work performed thereunder, the said security for the payment of such compensation and benefits, but nothing in this paragraph shall be construed to apply to any employee of such contractor or subcontractor who is engaged exclusively in furnishing materials or supplies under his contract;

irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such employee during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.

(b) As used in this section, the term "public work" means any fixed improvement or any project involving construction, alteration, removal, or repair for public use of the United States or its Allies, including but not limited to projects in connection with the war effort, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.

* * * * *

STATEMENT

Petitioners seek to review the judgment of the court below sustaining a compensation award to

respondent, Aida M. Parker. The controversy arose out of the following facts:

By a fixed price service contract with the United States dated October 29, 1943, and various supplements thereto, petitioner Republic Aviation Corporation agreed to furnish the services of aircraft technicians and test pilots to the Army Air Forces whenever requested (R. 25-27; Carrier's Exhibits 1-4, R. 37-85). Pursuant to this contract, Joseph F. B. Parker, who was employed by Republic as a test pilot and technician, was sent by Republic to the Pacific War Theatre at the request of Lieut. Gen. Kenney of the Far East Air Force (R. 24, 25, 27-28, 29). Parker's salary and expenses of transportation were charged to the service contract between the United States and Republic Aviation Corporation (R. 28). His mission was to assist in developing the range characteristics of the then new Republic P-47 aircraft (R. 29). While engaged in trying to solve this technical problem, Parker was killed on August 20, 1945, in a test flight take-off from the air field on Ia Shima (R. 28, 31).

Ia Shima, an island in the East China Sea, near Okinawa, was formerly a possession of Japan, but was invaded about April 1, 1945, by the armed forces of the United States, which took possession of the air base on the island by force of arms and were in possession of it at the time Parker met his death (R. 15, 18).

Respondent Aida M. Parker, widow of Joseph

F. B. Parker, filed a claim for compensation under the Defense Base Act, c. 357, 55 Stat. 622, as amended (42 U. S. C., Supp. V., 1651-1654), which extended the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, to cover employees in certain defense work outside the United States (R. 15). Petitioners controverted the claim on the ground that Parker was not engaged at the time of his death in any employment covered by the Defense Base Act as amended (R. 17-19). After a hearing, respondent Samuel S. Lowe, Deputy Commissioner of the United States Employees' Compensation Commission, entered an award in favor of Mrs. Parker, holding that the decedent's employment was within the scope of that Act, and particularly within the scope of Section 1 (a) (4) relating to employment under a contract for "public work" as that term is defined in Section 1 (b) of the Act (R. 8-9, 21, 35-36).

This proceeding was brought by petitioners in the United States District Court for the Southern District of New York under Section 21 of the Longshoremen's Act and Section 3 (b) of the Defense Base Act to set aside the compensation award (R. 3-7). The District Court sustained the award on the same ground taken by respondent Lowe, and rejected the contention made there on behalf of respondent Aida M. Parker that the decedent's employment was covered by Section 1 (a) (1) of the Defense Base Act, as amended, which

covers any employee engaged in any employment at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government (R. 99-103). On appeal, the court below held that the air base on Ia Shima was an air base "acquired after January 1, 1940, by the United States from any foreign government" within the meaning of Section 1 (a) (1), and affirmed the judgment of the District Court on that ground, so that it had no occasion to consider the ground of decision in that court, that the decedent's employment was on a contract for "public work" as contemplated by Section 1 (a) (4) (R. 113-118).

ARGUMENT

Petitioners contend that the decedent was not covered by the Defense Base Act, first, because Ia Shima was not "acquired" from a foreign government, second, that even if it was the award is not sustainable upon that ground because neither the Deputy Commissioner nor the District Court relied thereon, and, third, that the work upon which decedent was engaged at the time of his death (the ground relied upon by the Deputy Commissioner and the district court) was not "public work" within the meaning of the Act. We submit that the decision below was correct and, alternatively, that the ground relied upon by the Deputy Commissioner and the District Court is adequate to sustain the award.

1. Petitioners contend that as ordinarily used

the term "acquired" carries with it the idea of permanent possession, that the possession of Ia Shima by the United States was and is merely temporary, and that therefore the court below erred in holding that Ia Shima had been "acquired" by the United States (Pet. 12-13). Petitioners' own citations demonstrate that there is no basis for the contention that in ordinary usage the term "acquired" connotes only permanent possession as distinguished from temporary possession. According to the Century Dictionary, as quoted by petitioners, "* * * a mere temporary possession is not expressed by *acquire* but by *obtain*, procure, etc.," while the New Standard Dictionary definition of "acquire" which they quote is "*to obtain by search, endeavor, practise or purchase * * **" (Italics supplied; Pet. 12-13). Thus, while the word "obtain" is distinguished from "acquire" by one authority, it is used by another authority to define "acquire." Moreover, Webster's New International Dictionary (2d ed.) defines "acquire" as "to gain by any means, usually by one's own exertions; to get as one's own; * * *," while "obtain" is defined by the same authority as "to get hold of by effort; to gain possession of; to procure; *to acquire*, in any way; * * * [Italics supplied]. So, while it may be true, strictly speaking, that a mere temporary possession is not expressed by "acquire" but by "obtain," the fact that reliable authorities use each of these terms in defining the other shows clearly that in

ordinary usage 'no distinction is made between them. In fact, they have been held to be legal equivalents. *United States v. Winnicki*, 151 F. 2d 56, 59 (C. C. A. 7). As this Court said in *Helvering v. San Joaquin Co.*, 297 U. S. 496, 499, " * * * The word 'acquired' is not a term of art in the law of property but one in common use * * *."

Petitioners cite *Helvering v. San Joaquin Co.*, *supra*, in support of their argument that a thing is not "acquired" when the intention is merely to use it temporarily and to dispose of it when the immediate need is terminated (Pet. 13). This Court held in that case that where land held under a lease with an option to purchase was ultimately purchased by the lessee, the land was "acquired" within the meaning of the revenue laws at the time of the purchase and not at the time of the leasing. But to hold that a leasing was not an acquisition under Section 1 (a) (1) of the Defense Base Act as amended would be to hold that Section inapplicable to the bases leased to the United States by Great Britain in exchange for fifty destroyers in September, 1940. Yet the legislative history of the Defense Base Act shows clearly that it was intended to cover employees of contractors at the bases leased from Great Britain, and petitioners concede that this is true (Pet. 14). See H. Rept. 1070, 77th Cong., 1st sess., p. 5. Petitioners seek to reconcile their contention with this fact by arguing that it is the

intention of the United States Government to use these British bases “* * * permanently * * * on a continuous long term basis,” so that regardless of the fact that there has been no transfer of sovereignty over these bases, there is, nevertheless, a definite difference between the circumstances with regard to these bases and the circumstances with regard to such bases as Ia Shima (Pet. 14). But since these bases are merely leased and there has been no transfer of sovereignty over them, petitioner is simply arguing that our possession of those bases is permanent because it is less temporary than our possession of other bases, an argument which is obviously untenable.¹

Petitioners argue also that “To say that the United States ‘acquired’ Ia Shima logically requires a holding that the United States also acquired parts of North Africa, Italy, France, Germany, Holland, Belgium, China and many other parts of the world” (Pet. 13). The statute refers to “* * * any military, air, or naval base acquired * * *,” and we submit that any

¹ Moreover, this argument is based on the broad assumption that the United States will retain possession of the British bases longer than it will retain possession of bases in occupied enemy territory. There is no way now of knowing whether this will be the case. Japan and her outlying possessions are still under military occupation, and the air base on Ia Shima has not been abandoned but is being used by the Army Air Force as an alternate or auxiliary field. The disposition to be made of Ia Shima will not be finally determined until a peace treaty is signed.

civilian employee engaged in any employment at any such base in any of the countries named would be covered by the provisions of the Defense Base Act as amended. Petitioners do not suggest any reason why employees at a base of which the United States gained possession by force of arms should be denied the protection afforded by the Act to employees at a base which was acquired by friendly negotiations. Whatever force there might be to petitioners' argument that Section 1 (a) (1) of the Defense Base Act as originally enacted in August 1941 referred only to bases leased from Great Britain, disappeared with the reenactment of that subsection in December 1942, after this country had been at war for one year. Prior to Pearl Harbor, we could have acquired bases from foreign governments only by lease or some other formal transfer. However, it must be assumed that upon the reenactment of the subsection in December 1942, Congress must have intended it to apply to all bases on foreign soil no matter how acquired.

The legislative history of the Act of December 2, 1942, c. 668, 56 Stat. 1028, which amended the Defense Base Act, discloses a clear intent on the part of Congress to provide the broadest possible coverage to civilian employees of contractors working outside the United States.² This is forti-

² Excerpts from the legislative history of the 1942 Act which indicate the intended scope of the Act are set out in the Appendix, *infra*, pp. 19-23.

fied by Section 20 (a) of the Longshoremen's and Harbor Workers' Act (33 U. S. C. 920 (a)) made applicable by Section 1 (a) of the Defense Base Act, which provides that in the absence of substantial evidence to the contrary it shall be presumed that the claim comes within the provisions of the Act.

In the administration of this Act both the War Department and the Navy Department required contractors with the Government to provide insurance coverage for their employees on every contract where the work was to be performed outside the United States and such work was in the prosecution of the war (R. 32-35). This administrative interpretation of the statute is entitled to great weight. *Mabee v. White Plains Pub. Co.*, 327 U. S. 178, 182; *Boutell v. Walling*, 327 U. S. 463, 471. We submit that the air base at which the decedent was killed was clearly an air base "* * * acquired after January 1, 1940, by the United States from any foreign government" within the meaning of Section 1 (a) (1) of the Defense Base Act as amended, and that the decision of the court below sustaining the compensation award on that theory is entirely correct.

2. Petitioners now argue that the only question litigated at the trial was whether the contract between the Government and Republic Aviation Corporation was a "public work" contract under Section 1 (a) (4) of the Defense Base Act and that no evidence was introduced on the issue of

whether Ia Shima was "acquired" within the meaning of Section 1 (a) (1) of the Act, and that accordingly it was error for the court below to sustain the award on the latter theory (Pet. 6, 14). Aside from the fact that the presumption created by Section 20 (a) of the Longshoremen's and Harbor Workers' Compensation Act made such evidence unnecessary, the record shows that the hearing before respondent Samuel S. Lowe it was stipulated that under the terms of its contract with the Government, Republic Aviation Corporation was rendering service "* * * at Ia Shima, an island in the Pacific Ocean, formerly a possession of Japan, but prior to August 20, 1945, acquired by the United States by conquest," and there is a finding based on this stipulation (R. 9, 15). Furthermore, the record shows that at the hearing counsel for petitioners made a preliminary statement in which he discussed the applicability to the pending claim of each subparagraph of Section 1 (a), and in which he made the following statement (R. 18):

* * * The Island of Ia Shima was held by the Japanese Government until it was invaded about April 1, 1945 by the armed forces of the United States. The armed forces of the United States took possession of the air base in question by force of arms and was [sic] in possession of the base on August 20, 1945 at the time the employee met his death.

Sub-paragraph (1) of Section 1651 applied in respect to the injury or death of

any employee engaged in any employment at any military, air or naval base acquired after January 1, 1940 by the United States from any foreign government. We contend that inasmuch as the armed forces of the United States took possession of the air base where the accident occurred on the Island of Ia Shima by force of arms, this air base was not "acquired by the United States from a foreign government" as that term is used in sub-paragraph (1).

We submit that this stipulation and this statement by petitioners' counsel eliminated all factual issues from this phase of the case. The only issue raised at that time was one of law, as to whether an air base of which the United States had taken possession by force of arms had been "acquired" within the meaning of the Act. Having failed to question then the sufficiency of the agreed facts to form a basis for determining this issue of law, petitioners should be precluded from raising a factual issue here. *United States v. New York Telephone Co.*, 326 U. S. 638, 651 fn.

3. If this Court should hold that the Ia Shima air base was not "acquired" within the meaning of Section 1 (a) (1) of the Defense Base Act as amended, then respondent contends that the compensation award involved herein should be sustained on the ground that the decedent was employed under a contract for "public work" as defined in Section 1 (b), and was therefore covered by the provisions of Section 1 (a) (4) of

the Act. The award was made by respondent Lowe on the theory that the latter section was applicable, and was sustained by the District Court on the same theory (R. 21, 103). This ground for decision was not considered by the court below, as it sustained the award on the theory that Section 1 (a) (1) was applicable (R. 118).

Section 1 (b) of the Defense Base Act as amended (42 U. S. C., Supp. V, 1651 (b)) provides:

As used in this section, the term "public work" means any fixed improvement or any project involving construction, alteration, removal, or repair for public use of the United States or its Allies, including but not limited to projects in connection with the war effort, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.

The United States Employees' Compensation Commission has construed this statutory definition as embracing three general work categories, taking the view that the second and third clauses of the above definition are coordinate clauses, each independent of the principal clause in meaning (R. 21-22). Thus, the general category held to be established by the second clause is (R. 22):

* * * * *

(2) employments related (a) to any projects in connection with the war effort, and (b) any projects which fall specifically within such categories as dredging, harbor

improvements, dams, roadways, and housing, * * *.

This is a reasonable interpretation of the statute, since the phrase "including but not limited to" which introduces the second clause of the definition should be construed as enlarging the category set out in the first clause, as the term "including" in such a statutory definition is usually held to be a word of enlargement rather than a word of limitation. *American Surety Co. v. Marotta*, 287 U. S. 513; *United States v. National City Bank of New York*, 21 F. Supp. 791, 795 (S. D. N. Y.); *Koenig v. Johnson*, 71 Cal. App. 2d 739, 746-747, 163 P. 2d 746, 750; *Red Hook Cold Storage Co. v. Department of Labor*, 295 N. Y. 1, 7-8, 64 N. E. 2d 265, 267. Decedent's employment was on a project in connection with the war effort, and so within this interpretation. The intention of Congress was clearly to provide the broadest possible coverage to civilians employed outside the United States by government contractors. See Appendix, *infra*, pp. 19-23. The doctrine of *ejusdem generis*, invoked by petitioners (Pet. 16), does not warrant a construction of the Act which would limit it in a manner not intended by Congress. *Texas v. United States*, 292 U. S. 522, 534; *United States v. Gilliland*, 312 U. S. 86, 93. Moreover, the distinction made by petitioners (Pet. 16-17) between "work" and "services" is not applicable here, since the Act refers to "any employee engaged in any em-

ployment"—a phrase sufficiently broad to include both "work" and "services." We submit, therefore, that if the decedent's employment was not at an air base "acquired" within the meaning of Section 1 (a) (1) of the Defense Base Act as amended, then it was under a contract for the purpose of engaging in "public work" within the meaning of Section 1 (a) (4) and Section 1 (b) of that Act. Since the decision below is sustainable on the latter theory, the fact that the court below relied upon the former theory is no ground for reversal. *Helvering v. Gowran*, 302 U. S. 238, 245.

CONCLUSION

The decision of the court below is correct on the theory adopted by that court, or, in any event, is sustainable on the ground relied upon by the district court, which was not considered by the court below. There is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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FEBRUARY 1948.

APPENDIX

EXCERPTS FROM THE LEGISLATIVE HISTORY OF THE ACT OF DECEMBER 2, 1942, c. 668, 56 STAT. 1028

The following excerpts from the legislative history of the Act of December 2, 1942, c. 668, 56 Stat. 1028, indicate the intended scope of the Act, and particularly the intended scope of Title III thereof, which amended the Defense Base Act of August 16, 1941, c. 357, 55 Stat. 622 (42 U. S. C., Supp. V, 1651-1654):

1. This Act originated in the Senate of the 77th Congress as S. 2412, Title V of the original bill substantially embodying the provisions of the present Title III. At the Hearings before a Subcommittee of the Senate Committee on Education and Labor on S. 2412, 77th Cong., 2d sess., Major Burton, referring specifically to the original Title III and by implication to the original Title V (the present Title III), said (p. 55):

Major BURTON. I wanted to make the further observation, so there would be no question about it, the third title was drafted primarily to meet already existing needs of the War and Navy Departments in connection with the operations outside of the continental United States, and we have tried to incorporate in that bill legislation to cover those matters which we are now having to cover by contract.

Senator PEPPER. Take a workman, it covers defense projects but not factories, building bases and construction work of one sort or another?

Major BURTON. Well, as amended, it will cover every activity outside of the continental United States in connection with the war effort.

Senator PEPPER. It would include a factory that the Government established out there, but not a factory that local people built out there?

Major BURTON. Not unless they were doing it under a contract with the Government.

Now we have a few powder plants being built in this country by contractors, and they will be operated by the Government in this country. Now if such a situation should exist with reference to a factory outside of the United States, it would be covered here. That is, we have a contract with the Government to do that thing, and we carry employees outside of the United States to operate that plant who are going to work for a contractor who has a contract with the United States Government. Then this bill does cover them.

Senator PEPPER. Do you distinguish between a construction contract with the Government and an operation contract with the Government?

Major BURTON. Not so far as this bill is concerned, if it is outside of the United States.

2. Senator Pepper, sponsor of S. 2412, made the following statement during the debate on the bill, after it had been reported out by the Senate Committee on Education and Labor (88 Cong. Rec. 5339):

Mr. PEPPER. Let me add a further observation, then I will yield to the Senator. Heretofore the benefits of the Longshore-

men's Act have been available only to those who were working upon military or naval bases, and not on some other public work, which was provided or was in the course of construction at the instance of the United States Government. Under this bill any kind of a public work is included. So that, if a citizen of the United States or a person owing allegiance to the United States or a resident of the United States abroad should sustain injury in any one of these types or degrees, then the benefits of this proposed law would be available to such persons.

* * * * *

3. Before being passed by the Senate, S. 2412 was amended by the deletion of Titles I and II, so that the original Title V became the present Title III. See 88 Cong. Rec. 5413, 5426. During the Hearings before Sub-committee No. 1 of the House Committee of the Judiciary on S. 2412, 77th Cong., 2d sess., Lt. Col. Reese F. Hill, Chief of the Insurance Branch of the Fiscal Division, Headquarters, Services of Supply, War Department, testified as follows (p. 9):

* * * The problem involves not only cost-plus-fixed-fee contractors, but fixed-price contractors as well. We have contractors all over the world engaged in practically every zone of activity, and the War Department and the other Government departments concerned were beginning to absorb an administrative burden which, had we run into any considerable difficulty, would have been enormous. * * *

(p. 13):

Mr. KEFAUVER. Colonel Hill, you have stated clearly for the record as a fact, without divulging where, that the United States

is at this time, as we all know, building numerous bases throughout the world and you are having some difficulty in getting civilian workers to accept employment at those places?

Colonel HILL. Well, that is a major problem which is confronting the War Department today. We are engaged in activities which require employees of contractors not necessarily to be based in the enemy area, but perhaps, constantly to fly over occupied territory, or to fly routes which have never been flown before by that personnel, where there is no question but what they are in a war zone. * * *

(p. 21):

Colonel HILL. * * *

Title III amends the Longshoremen's and Harbor Workers' Compensation Act as extended by Public, No. 208, and the primary purpose of the amendment was to rephrase the language in order to make it absolutely clear as to the intent of it. It also was extended to apply to public works rather than to military and naval bases and was extended to the Canal Zone. This act was primarily conceived for the purpose of applying to military and naval bases.

Mr. KEFAUVER. You mean 208.

Colonel HILL. Public, No. 208 was primarily conceived for the purpose of applying to military bases. But now we have many agencies of the Government engaged in work in these out-lying areas and there was some question as to what would be a military base and what might not be a military base, depending upon, to some extent, the agency under which the work was being done.

In order to avoid that, and in order to provide an equal basis for employees in the same area subject to the same hazards, it was felt that it would be desirable to extend the application of 208 to public works rather than to limit the application of it to military and naval bases as originally enacted.

4. The report of the House Committee on the Judiciary, H. Rept. 2581, 77th Cong., 2d sess., contained the following statement concerning Title III of the bill (pp. 18-19):

* * * The purpose in including employees of Government contractors engaging in public work outside of the United States is to afford a uniform coverage for all employees of such contractors; that is, not only for those employees employed on military, air, and naval bases heretofore covered by the Defense Base Act, but for employees of such contractors who are engaged in construction and similar work at places not specifically within the confines of military and naval bases, which at some places may be contiguous thereto. This will eliminate the discrimination and inconsistency in affording protection to contractors' employees on military and naval bases and not affording similar protection to other Government contractors' employees, performing work for the United States often in the same general areas.

